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No. ——

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In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee covered by a Railway Labor Act ("RLA") collective bargaining agreement may circumvent the RLA's exclusive grievance and arbitration procedures for "minor disputes" by bringing a state-law action for wrongful discharge in violation of public policy.

2. Whether a state-law cause of action for wrongful discharge alleging retaliation for union organizing activities is preempted by Sections 2 Third and Fourth of the RLA, which prohibit carrier interference with employee rights to organize and select bargaining representatives.

LIST OF INTERESTED PARTIES

Petitioner American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation, a publicly traded Delaware corporation headquartered in Texas. American has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 463 (App. 1a-14a). The opinion of the district court (App. 15a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. American's timely petition for rehearing was denied on September 8, 1992. (App. 40a-41a). On November 30, 1992, Justice White extended the time within which to file a petition for a writ of certiorari to and including December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

The pertinent sections of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* and the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.* are reproduced at App. 56a-64a.

STATEMENT OF THE CASE

A. Factual Background

Respondent Scott Davies was employed by American Airlines, Inc. ("American" or "the Carrier") as an airline mechanic at the Carrier's Tulsa, Oklahoma maintenance base. The terms and conditions of Davies' employment were governed by the collective bargaining agreement negotiated by American and his bargaining representative, the Transport Workers Union of America ("TWU") pursuant to the Railway Labor Act ("RLA"). Appendix B to that collective bargaining agreement (the "TWU Agreement") incorporates by reference American's rules, regulations and procedures. (App. 53a). Article 28 of the TWU Agreement prohibits discharge except for just cause. (App. 43a).

In October 1989, Davies placed an advertisement in a Tulsa newspaper to publicize a debate between the TWU and a rival union of which Davies was a member. The heading he used for the advertisement was: "AMERICAN AIRLINES." (App. 21a, 25a). Davies was counseled for that action because using American's name in that fashion violated the Carrier's regulation requiring prior authorization for any use of American's name in public. It also violated American's policy of strict neutrality with respect to inter-union disputes by

making American appear to be sponsoring the debate and thus interfering in union matters. (App. 26a). By doing so, Davies put American at risk of legal action under Sections 2 Third and Fourth of the RLA, 45 U.S.C. § 152 Third and Fourth, for interfering with its employees' rights to organize and select bargaining representatives.

In accordance with American's counseling procedures (App. 54a-55a), Carrier representatives met with Davies three times in an effort to secure his agreement not to use American's name in similar fashion in the future. (App. 28a-31a). Davies contended that the heading "AMERICAN AIRLINES" was meant to refer to all airlines in the United States, and he refused to refrain from using that wording. He further contended that American was interfering with union organizing activity. (App. 29a-30a). American thereafter issued Davies a "Career Decision Day Advisory," the final step of its counseling procedures. In accordance with those procedures, the Advisory gave Davies one day off with pay to decide whether (1) to agree to comply with all rules and regulations; (2) to resign with severance benefits, or (3) to be discharged with full grievance rights. The following day, October 20, 1989, Davies refused to respond to the Advisory, and was discharged. (App. 22a-23a, 30a-31a).

Davies grieved his discharge pursuant to the grievance and arbitration procedures set forth in Article 31 of the TWU Agreement. (App. 44a-45a). On January 16, 1990, in accordance with the RLA and Article 32 of the Agreement (App. 46a-52a), Davies' discharge was arbitrated before a statutory three-person System Board of Adjustment chaired by a neutral arbitrator. The System Board held a full hearing on the question of whether Davies had been discharged for just cause and, if not, what the remedy should be. Davies was represented at the hearing by a TWU official (App. 21a). The Board heard testimony from five witnesses, two on behalf of

American, and three witnesses, including Davies, on his behalf.

The Board, in a written opinion (App. 20a-39a), sustained Davies' discharge for just cause. It concluded that Davies had been apprised of the consequences that can result from unauthorized use of American's name, particularly with reference to inter-union disputes. Nevertheless, he refused to admit error or to commit to avoiding such action in the future. The Board also concluded that Davies had offered a "blatantly absurd" excuse for his actions, namely that by using the words "American Airlines" in the advertisement he was not referring to American, but to all airlines in the United States. Under these circumstances, the Board found there was just cause under the TWU Agreement for the Carrier's decision to discharge him. (App. 36a-39a).

B. The District Court's Decision

On October 20, 1989, the day he was discharged, Davies filed this lawsuit against American in the United States District Court for the Northern District of Oklahoma. The complaint alleged that American was threatening to discharge Davies in retaliation for his union activities. After his discharge, he amended the complaint to state a cause of action for wrongful discharge in violation of a public policy against employer interference with union organizing activities, and a separate cause of action under Sections 2 Third and Fourth of the RLA based on the same facts. Davies invoked the district court's jurisdiction under those sections of the RLA, and sought both reinstatement and damages. Davies then filed a second amended complaint, voluntarily dropping the RLA claim but maintaining the state-law cause of action based on diversity jurisdiction. In that complaint, he sought damages but not reinstatement.

Following the district court's denial of American's motions to dismiss and for summary judgment, the case went to trial on the wrongful discharge claim. A jury

rendered a verdict in Davies' favor, awarding him $81,000 in actual damages and $15,000 in punitive damages. The district court then granted American's motion for judgment notwithstanding the verdict. The court held that Oklahoma's judicially-created cause of action for wrongful discharge was limited to at-will employees; since Davies could not be discharged except for just cause, he was not an at-will employee and could not bring the claim. The court further held that Oklahoma's cause of action was unavailable to Davies because he had a remedy under the Railway Labor Act. (App. 18a-19a).

C. Decision of the Court of Appeals

The court of appeals reversed. (App. 2a). It ruled that Davies could bring a state claim for wrongful discharge in violation of a public policy against employer interference with union organizing activities notwithstanding the arbitration award sustaining his discharge for just cause. The court held that the action was not precluded as a "minor dispute" controlled by the grievance procedure under the RLA. (App. 11a). It further held that Oklahoma would recognize the action even though Davies was not an "at-will" employee and was protected by a collectively bargained just-cause limitation on discharge. (App. 14a). The court did not address the issue of whether Davies' action was preempted by Sections 2 Third and Fourth of the RLA because American had not argued that issue to the court at that time.

The court acknowledged that, if Davies' claim presented a "minor" dispute, the arbitral remedy provided under Section 153 of the RLA, 45 U.S.C. § 153, would be exclusive. (App. 5a). The court stated that the distinguishing feature of a minor dispute is that it "may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Id.*, *quoting Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* ("*Conrail*"), 491 U.S. 299, 305 (1989).

American argued that Davies' claim was a minor dispute because it required interpretation of the "just cause" provision of the TWU Agreement. The court rejected that argument based on *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. The court ruled in *Lingle* that a state-law claim is preempted under Section 301 only if "resolution of [that claim] depends upon the meaning of a collective-bargaining agreement . . . ." 486 U.S. at 405-06. The fact that the claim might involve a parallel inquiry into "the same factual considerations as the contractual determination of whether [the employee] was fired for just cause" was insufficient to trigger preemption. *Id.* at 408.

Lingle arose under the LMRA. The court of appeals acknowledged that "RLA preemption is statutory, whereas LMRA preemption is contractual." (App. 8a). The court nonetheless found *Lingle* "just as valid" under the RLA. *Id.* at 7a. Based on *Lingle*, the court reasoned that the issue presented by Davies' claim was American's actual motivation in discharging him, irrespective of any "just cause" for discharge under the TWU Agreement. Thus, it concluded, Davies' claim did not present a minor dispute. *Id.*

Finally, the court of appeals rejected American's argument that Davies' claim was preempted as a minor dispute under the so-called "omitted case" doctrine even if it did not involve interpreting the TWU Agreement. In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945), the Supreme Court defined "minor disputes" to include claims "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." American argued that Davies' claim was an "omitted case." The court of appeals rejected that argument on the grounds that the "omitted case" doctrine

allegedly had been overruled by *Conrail* and was not sound. (App. 9a).

D. Petition for Rehearing.

American's petition for rehearing argued that the court's holding on the minor dispute issue conflicted directly with this Court's decision in *Conrail* and with Tenth Circuit precedent holding state-law wrongful discharge claims preempted by federal labor law. In addition, American urged for the first time that, even if Davies' wrongful discharge claim were not preempted as a minor dispute, the court still lacked subject matter jurisdiction because state-law claims by RLA-covered employees alleging retaliation for union organizing activities are preempted by, and must be resolved exclusively under, Sections 2 Third and Fourth of the RLA.

After denying the petition for rehearing, the court of appeals granted American's motion to stay the court's mandate pending final disposition by this Court. (App. 42a).

REASONS FOR GRANTING THE PETITION

I. THE ISSUES PRESENTED HERE WARRANT REVIEW BY THIS COURT

The court of appeals' decision conflicts with decisions of this Court that define the scope of minor dispute preemption. The decision also conflicts with federal appellate decisions on the important question of the RLA's preemption of state-law retaliatory discharge claims. In doing so, moreover, the decision seriously undermines important principles of federal labor policy.

A. Importance of the Minor Dispute Preemption Issue

The court of appeals' conclusion that Davies' claim did not present a minor dispute subject to the grievance procedure conflicts directly with *Conrail*'s holding that a dispute is minor if the employer's action is "arguably justified" by the collective bargaining agreement. 491 U.S. at 307. In light of the System Board decision upholding Davies' discharge, it cannot be disputed that his discharge was arguably justified under the just-cause and counseling provisions and rules and regulations incorporated within the TWU Agreement.

Failing even to address *Conrail*'s "arguably justified" standard, the court of appeals relied instead on *Lingle*. The decision to apply *Lingle* to the RLA, a statute which has greater preemptive force than the LMRA, *cf. Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 323 (1972), creates a conflict within the courts of appeals on that issue. *See Lorenz v. CSX Transp., Inc.*, No. 91-1876, 1992 U.S. App. LEXIS 30973 at * 15 (4th Cir. Nov. 24, 1992); *Grote v. Trans World Airlines*, 905 F.2d 1307, 1309-10 (9th Cir.), *cert. denied*, —— U.S. ——, 111 S. Ct. 386 (1990). The decision further conflicts with an unbroken line of court of appeals decisions holding state-law retaliatory discharge claims preempted under the RLA. *See Grote*, 905 F.2d at 1310; *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986), *cert. denied*, 488 U.S. 925 (1988); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1348 (7th Cir. 1986); *Minehart v. Louisville & N. R.R.*, 731 F.2d 342, 345 (6th Cir. 1984).

This case is important not only because of these conflicts but because of the federal labor policies they implicate. First, the court of appeals carves out an exception to the jurisdiction of the statutory adjustment boards that is potentially enormous. Virtually all states now

recognize a cause of action for wrongful discharge in violation of public policy. *See* Henry H. Perritt, Jr., 1 *Employment Dismissal Law and Practice* 26-66 (3d ed. 1992), and cases cited therein. The public policies that are actionable are normally derived from constitutional, statutory or common law precedent. *Id.* at 5-7, 26-66, 446-57. As such, the range of policies that may be invoked to support a wrongful discharge claim is virtually unlimited. Every grievant will have the same incentive: there would be nothing to lose by "trying out" arbitration, and, if unsuccessful, reformulating that claim into a public policy violation.[1]

In addition to creating a dangerously large loophole in adjustment board jurisdiction, the effect of permitting such "free bites" in arbitration will be to undermine the authority and efficacy of the statutory adjustment boards. This Court has repeatedly rejected such a scenario, recognizing the inherent conflict with the RLA's structure and purpose.

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[1] In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that a claim of discrimination under Title VII of the Civil Rights Act of 1964 was not precluded merely because an employee had arbitrated the validity of a discharge. However, that decision reflects an accommodation of one federal law to another federal law, a question far removed from that of the preemption of state common law wrongful discharge actions under the Supremacy Clause. Congress has the freedom to determine when claims may be asserted outside of arbitration; states do not. This point, which also applies to the LMRA, applies with special force under the RLA.

Similarly, as discussed *infra*, some discharge cases alleging carrier interference with union organizing activities may state an independent claim under Sections 2 Third and Fourth of the RLA. However, the very determination of whether such a case falls within the exclusive jurisdiction of an adjustment board or into one of the limited classes which does not is a matter of federal law and federal labor policy.

> To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded "as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision . . . [a contention] inconsistent with the Act's terms, purposes and legislative history." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 720-721.

Union Pac. R.R. v. Price, 360 U.S. 601, 617 (1959). *See also Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (dismissing wrongful discharge claim; "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.")

Finally, assuming *arguendo* that *Lingle* applies under the RLA, the court of appeals misapplied it in a manner that invites state courts and juries to interpret and construe collective bargaining agreements—a role from which they are excluded under the RLA. The court's conclusion that the only issue was American's *motivation* in discharging Davies, *i.e.*, whether American was motivated by anti-union animus, ignores the fact that a jury would have to decide whether the Carrier's asserted contractual basis for discharging Davies was pretextual. This inquiry entails addressing whether Davies in fact violated the TWU Agreement and, if so, how consistently American has applied its disciplinary procedures to such violations. The fact that a jury passes on such questions in the context of the employer's *defense* to a wrongful discharge claim, rather than the claim itself, does not in any way lessen the conflict with federal labor policy, which mandates that such issues be committed exclusively to arbitration.

B. Importance of the Sections 2 Third and Fourth Preemption Issue

The conflict with federal labor policy is heightened in this case because the particular public policy that Davies invokes is one that arises out of the RLA: the prohibition in Sections 2 Third and Fourth against carrier interference in employee organization and the selection of bargaining representatives. This prohibition lies at the very core of the RLA and preempts parallel and overlapping state causes of action.

No decision of this Court or any court of appeals has directly addressed the preemptive effect of Sections 2 Third and Fourth, and the RLA generally, over state-law claims for interference with bargaining and representational rights. Two district courts, however, have held such claims preempted.[2] Moreover, two courts of appeals that have addressed the same issue in cases arising under the LMRA, a statute with less preemptive force, have held that such claims must be preempted in order to avoid the danger of state interference with the application of a consistent and uniform national labor policy. *Platt v. Jack Cooper Transp. Co.*, 959 F.2d 91 (8th Cir. 1992); *Viestenz v. Fleming Cos.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982). The need for consistency and uniformity is even more important under the RLA, which is premised on company-wide (and thus in many cases nationwide) bargaining units, collective bargaining representatives, and bargaining obligations.

The RLA's exclusive regulation of representation disputes and its prohibition against carrier interference are central to the workings of the Act. Congress committed the resolution of representation disputes to the jurisdic-

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[2] *Tipton v. Aspen Airways*, 741 F. Supp. 1469, 1472 (D. Colo. 1990); *Calhoun v. Evergreen Int'l Airlines*, No. C 86-0551-L(B) (W.D. Ky. Oct. 24, 1986), *rev'd on other grounds*, 828 F.2d 19, 1987 U.S. App. LEXIS 11702 at *2-3 (6th Cir. 1987).

tion of the National Mediation Board ("NMB") except for a limited class of cases involving carrier interference encompassed within Sections 2 Third and Fourth. Cases of discipline or discharge involving carrier interference either fall within the limited jurisdiction of Sections 2 Third and Fourth or are minor disputes for which resolution is exclusively committed to adjustment boards.

Congress intentionally structured the RLA to provide comprehensive and exclusive dispute resolution mechanisms covering minor disputes, representation and interference cases. The Act leaves no room for state-created common-law causes of action. Even parallel and overlapping state actions must give way because of the preemptive force of the RLA and the policy favoring a uniform national labor law.

II. THE RLA ESTABLISHES MANDATORY AND COMPREHENSIVE DISPUTE RESOLUTION PROCEDURES, SUPPORTED BY LIMITED FEDERAL CAUSES OF ACTION

Congress enacted the RLA to stabilize labor-management relations in rail and air transportation by providing mandatory procedures for the orderly and peaceful resolution of disputes between carriers and employees. 45 U.S.C. § 151(a). These statutory procedures address the three primary classes of disputes that typically resulted in labor-management discord: bargaining (or so-called "major") disputes, grievances ("minor" disputes), and representation disputes.

Major disputes, involving attempts to change rates of pay, rules, or working conditions, 45 U.S.C. § 155 First, are to be resolved by an elaborate process involving advance notice, conference, mediation, arbitration, and possibly emergency presidential intervention. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Minor disputes, which involve "disputes between an employee or group of employees and a carrier

. . . growing out of grievances or out of the interpretation or application of agreements" are to be resolved through binding arbitration before an adjustment board whose awards are enforceable in the district courts. 45 U.S.C. § 153 First(i), (m), (p), § 184. "Representation" disputes, which involve controversies over the designation of collective bargaining representatives, are committed to the exclusive jurisdiction of the NMB. 45 U.S.C. § 152 Ninth; *see Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 302-04 (1943).

The representation, bargaining, and arbitration procedures of the RLA constitute a comprehensive system for the resolution of the principal controversies arising between a carrier and its employees. Each of these procedures is enforceable through federal causes of action. *See Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 581 (1971) (major dispute procedures enforceable by federal court injunction); *Conrail*, 491 U.S. at 304 (courts may enjoin strikes arising out of minor disputes); *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 544-45 (1937) (carrier's duty under Section 2 Ninth to negotiate with a union certified by NMB is mandatory and enforceable). Moreover, those statutory procedures leave no room for state initiative. *See Jacksonville Terminal Co.*, 394 U.S. at 380-82 (state action which could affect major dispute procedures prohibited); *Conrail*, 491 U.S. at 304 (adjustment board jurisdiction of minor disputes is exclusive); *Switchmen's Union*, 320 U.S. at 302-04 (representation matters falling within Section 2 Ninth committed exclusively to NMB, precluding judicial action).

Sections 2 Third and Fourth of the RLA address a class of disputes which, in effect, is both a limited exception and a complement to the NMB's jurisdiction over representation cases. These provisions prohibit carrier interference with the selection of bargaining representatives and are designed to protect the representation proc-

ess. Congress deemed the freedom from such interference to be "the essential foundation of the statutory scheme," thus warranting the special statutory provisions. *See Texas & N.O. R.R. v. Ry. & Steamship Clerks*, 281 U.S. 548, 569 (1930). As with the other classes of disputes discussed above, the prohibitions established in Sections 2 Third and Fourth are mandatory and enforceable in federal court. *Id.; see also Virginian Ry.*, 300 U.S. at 544-45.

Cases involving allegations of discipline in retaliation for union activities potentially fall into two different categories: minor disputes and carrier interference cases. The federal courts have endeavored to strike a balance between their limited role in enforcing Sections 2 Third and Fourth and the exclusive jurisdiction of adjustment boards over matters involving employee discipline and discharge. *See, e.g., National R.R. Passenger Corp. v. IAM*, 915 F.2d 43 (1st Cir. 1990); *Independent Union of Flight Attendants v. Pam Am. World Airways*, 789 F.2d 139 (2d Cir. 1986); *Machinists v. Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982). These cases suggest that it is not easy to define precisely the dividing point between what falls exclusively within adjustment board jurisdiction and what falls under Sections 2 Third and Fourth. What clearly emerges, however, is that the line is continuous: there is no gap to be filled by a state-law action.

The important question created by the court below results from its recognition of a state-law enforcement alternative to the detailed and comprehensive scheme of the RLA. There is no precedent or reason to interject such state-law causes of action. What the court should have done and failed to do was to apply federal law and decide either 1) that Davies' claim was a minor dispute and that the System Board was the exclusive forum for adjudicating it, or 2) that Davies' claim properly was the subject of a cause of action under Sections 2 Third and

Fourth (which Davies originally pled but withdrew), preempting his state-law claim.

When confronted with a claim that carrier discipline is the result of representation interference, the court's role is limited to determining whether it is necessary for the court to intervene under Sections 2 Third and Fourth notwithstanding the availability of a statutory grievance procedure. That determination is not a matter of state law, nor can a common-law retaliatory discharge claim be permitted to supplant Sections 2 Third and Fourth. In light of the history of the Act and its comprehensive exclusive dispute resolution mechanisms, a state common-law cause of action for wrongful discharge alleging retaliation for union activities cannot be allowed to coexist with the RLA.

III. DAVIES' CLAIM WAS PREEMPTED AS A MINOR DISPUTE UNDER THE RLA

A. The Decision Below Directly Conflicts With *Conrail* and Misapplies the Court's Prior Decision in *Lingle*

In its recent *Conrail* decision, the Court established a test for determining when a dispute is "minor" and thus exclusively committed to an adjustment board.

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Conrail, 491 U.S. at 307. Applying *Conrail*, Davies' wrongful discharge claim must be preempted because the Carrier's disputed action—the discharge—is without question "arguably justified" under the TWU Agreement. The decision of the System Board of Adjustment precludes a contrary conclusion. Even without the benefit of the System Board award, however, Davies' claim alleg-

ing he was improperly discharged falls squarely within the definition of a minor dispute as set forth in *Conrail*. *See Polich v. Burlington Northern*, 942 F.2d 1467, 1470 (9th Cir. 1991) (under *Conrail*, claim is preempted if the carrier seeks to defend its conduct as justified by the terms of the collective bargaining agreement).

The court of appeals properly acknowledged *Conrail* as this Court's latest word on what constitutes a minor dispute. (App. 5a). Having identified the governing authority, however, the court failed to apply it. Indeed, the court did not discuss or even refer to the "arguably justified" test. Instead, as noted above, it relied solely on *Lingle*. That reliance was erroneous. First, *Lingle* predates *Conrail*, and is irreconcilable with *Conrail*'s "arguably justified" test. Second, *Lingle* arose under Section 301 of the LMRA. Arbitration under the LMRA is voluntary and a matter of contractual undertaking between the parties. By contrast, the RLA embodies *compulsory* dispute resolution provisions. Based on that distinction, this Court has recognized that preemption under the RLA is if anything broader than under Section 301. *Andrews*, 406 U.S. at 323.

Even if *Lingle* were the standard for RLA preemption, the court of appeals misapplied its teaching. As discussed above, *Lingle*'s test for LMRA preemption is whether the "*resolution*" of the state-law claim requires construing the collective bargaining agreement. 486 U.S. at 405-06. In *Lingle*, resolution of the state-law claim did not require construing the agreement because neither the claim *nor the employer's defense* involved terms of the agreement. The employee alleged that she had been discharged in retaliation for filing a worker's compensation claim. The employer's defense was that she was discharged for filing a *false* claim. That defense did not require interpreting the collective bargaining agreement. Consequently, *reso-*

lution of the claim did not implicate the agreement, and the claim was not preempted.

That is not this case, however. American's defense both to Davies' grievance and his wrongful discharge claim is based on the collective bargaining agreement: that Davies violated regulations and policies concerning the use of American's name and its neutrality in union disputes, and refused to commit to comply with them in the future pursuant to American's counseling procedures, all of which are part of the TWU agreement.[3] Davies argued that his discharge in fact was motivated by his union activity. In determining the issue of motivation, however, the jury necessarily had to consider American's contractual defense in order to determine if that defense was merely a pretext for antiunion animus. Theoretically, direct evidence of antiunion animus could negate the need to make that inquiry. Such a case is rare in the practical world of labor relations, however. As in *Davies*, proof of illegal animus is almost always based on indirect evidence, thus requiring a factfinder to assess the validity of the employer's contractual reasons for its action. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (proof of intentional discrimination by indirect evidence involves *prima facie* case by plaintiff, articulation of legitimate reason by employer, and proof by plaintiff that legitimate reason is not worthy of credence or is mere pretext for discrimination).

In this case, the jury necessarily considered whether Davies did in fact violate American's regulations and procedures, and if so, whether the discipline imposed was

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[3] American's rules and regulations are incorporated into the Agreement by reference in an Appendix that is explicitly made part of the TWU Agreement. (App. 53a). Even if that were not the case, those rules and regulations are also part of the "common law" of the shop that is exclusively committed to arbitral resolution. *See, e.g., Conrail*, 491 U.S. at 311-12.

consistent with other cases involving similar violations. These inquiries are precisely the issues that are submitted to arbitration. Federal labor policy is equally violated when a jury interprets a collective bargaining agreement in the context of a defense to a state-law claim as it is when the jury does so in evaluating the claim itself. *Lingle* does not anticipate state courts and juries interpreting collective bargaining agreements in any context—that function is properly for the arbitrator.

The policy favoring arbitration is so strong in the RLA and the opinions of this Court that the decision below must be corrected to ensure that the statutory arbitration procedure is not weakened by an inappropriate expansion of the narrow exception created under the LMRA in *Lingle*. This Court, and Congress, never intended to cede to the state courts independent jurisdiction to determine whether the employer's contractual basis for discipline was erroneous.

B. The "Omitted Case" Doctrine Enunciated in *Burley* Was Not Overruled in *Conrail*

The court below also made an important error when it dismissed the so-called "omitted case" doctrine. Years ago, this Court in *Burley* defined the breadth of cases exclusively committed to adjustment boards under the RLA and included those in which the claim is founded upon "some incident of the employment relation or asserted one, independent of those covered by the collective agreement . . ." *Burley*, 325 U.S. at 723. *See also Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987), and cases cited therein.

The court of appeals identified the "omitted case" doctrine, but concluded that the rule, in material part, "appears to have been overruled by *Conrail*." (App. 9a). That conclusion is wrong and causes the potential for great mischief in the process of day-to-day labor rela-

tions. *Conrail* expressly relied on *Burley* in distinguishing major from minor disputes. *See* 491 U.S. at 302-03. Indeed, the *Conrail* opinion *quoted*, with evident approval, the entire passage in *Burley* that established the "omitted case" rule. *Id.* at 303.

Moreover, *Conrail* itself represents an application of one form of "omitted case." This Court held that the dispute in *Conrail* was minor even while expressly recognizing that neither party relied on any provision of the collective bargaining agreement, which was not even part of the record before the Court. *Id.* at 311. The Court observed that collective bargaining agreements include implied terms based upon practice, usage, and custom. Those terms ultimately create a common law of the particular industry or plant that "covers the whole employment relationship." *Id.* at 311-12. The elimination of the omitted case doctrine improperly circumscribes arbitration procedures in an industry where established labor-management relationships depend to a large extent on rules and practices that supplement and fill out the formalized written agreements.

C. The Decision Below Conflicts With Court of Appeals Decisions Holding State-Law Retaliatory Discharge Claims Preempted

This Court has not directly addressed whether a state claim of wrongful discharge in violation of public policy constitutes a minor dispute preempted by the RLA. However, the Ninth Circuit so held in *Grote*, a post-*Lingle* retaliatory discharge case. In *Grote*, an airline pilot alleged that he was discharged in retaliation for refusing his employer's demand to perjure himself to the Federal Air Surgeon in order to obtain medical recertification after a heart attack. The Ninth Circuit found the plaintiff's claim to be "arguably governed" by a part of the collective bargaining agreement dealing with the carrier's ability to require any of its pilots to maintain a current

medical certificate. Moreover, the court found that because the plaintiff's "entire claim is in response to an alleged wrongful termination . . . 'the gravamen of [his] complaint is wrongful discharge.'" 905 F.2d at 1309, *quoting Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986).

Although *Grote* is the only court of appeals case addressing this issue after *Lingle*, its holding is consistent with the decisions of all the circuit courts that considered the preemptive effect of the RLA over state-law retaliatory discharge claims before *Lingle*. *See Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1054 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Minehart*, 731 F.2d at 345; *Mayon*, 805 F.2d at 1253; *Graf*, 790 F.2d at 1348.[4] The conflict created by the decision below needs to be resolved, and resolved promptly, before discharged employees routinely clothe their grievances in public policy dress in order to present them to juries in state-court actions or federal diversity suits. The rules must be clear, and only this Court can make them so.

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[4] The decision below also conflicts with circuit court decisions holding other kinds of wrongful discharge claims preempted. *See, e.g., Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414, 417 (10th Cir.) (RLA preempts wrongful discharge action based on breach of common law contract), *cert. denied*, 469 U.S. 822 (1984); *Magnuson v. Burlington Northern*, 576 F.2d 1367, 1369 (9th Cir. 1978) (complaints of wrongful discharge are minor disputes); *Edelman v. Western Airlines*, 892 F.2d 839, 844-45 (9th Cir. 1989) (wrongful discharge claim preempted by RLA). *Cf. Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989) (RLA preempts wrongful demotion claim).

IV. THE RLA PREEMPTS STATE-LAW CLAIMS ALLEGING WRONGFUL DISCHARGE FOR UNION ORGANIZING ACTIVITY

Even if the court of appeals were correct in concluding that Davies' claim was not preempted as a minor dispute, the court should not have permitted Davies to proceed on a state-law "public policy" claim alleging retaliation for union organizing activities. Such a claim is preempted by the RLA generally, and in particular by the federal remedy created by Sections 2 Third and Fourth.[5]

American is unaware of any Supreme Court or court of appeals decision directly addressing the preemptive effect of Sections 2 Third and Fourth over state-law claims of wrongful discharge based on alleged retaliation for union organizing activities. However, based upon closely analogous preemption principles enunciated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the decision below makes a significant error that disrupts a sensitive and important labor policy concerning the regulation of representation disputes. According to *Garmon*, Congress forbade the states from regulating conduct "arguably prohibited" or "arguably protected" by the LMRA, in order to avoid the danger of state interference with national labor policy. State regulation may survive only where the issue is of "peripheral concern" to the LMRA, or where the conduct in question is so "deeply rooted in local feeling

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[5] Although American did not raise the preemptive effect of Sections 2 Third and Fourth until it filed its petition for rehearing, this is an important jurisdictional issue that this Court can and should address on writ of certiorari. *See Louisville & N. R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (Court *sua sponte* remitted case to circuit court for dismissal for lack of jurisdiction even though neither party raised issue; "it is the duty of this court to see to it that the jurisdiction of the circuit court . . . is not exceeded."); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-37 (1962) (jurisdictional matters not raised "at the earliest practicable opportunity . . . may be questioned on direct review for the first time in this Court.").

and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 243-44. *See, e.g., Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) (claim of outrageous conduct actionable even if underlying discrimination arguably prohibited by the LMRA); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (similarly, malicious libel action); *cf. Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (pre-*Garmon*; violent and coercive picketing actionable under state law).

Garmon provides a perspective from which to understand the significance of the court of appeals' error. The perceived need for uniform national labor policy under the LMRA is even more compelling under the RLA, particularly with respect to activities that affect the selection of bargaining representatives. The RLA was the 1926 legislative enactment of an agreement between leaders of railroad unions and the carriers. *Texas & N.O. R.R.*, 281 U.S. at 563. The purpose of the law was to ensure labor peace in a highly integrated rail industry critical to the economic well-being of the nation. *Id.* at 561-64. Congress intended uniform labor policies to apply in the rail and air industries. *See, e.g., Kidd v. Southwest Airlines*, 891 F.2d 540, 545 n.4 (5th Cir. 1990). State causes of action to enforce organizing rights would leave carriers and employees with a patchwork of inconsistent obligations, rights and remedies. *Cf. Jacksonville Terminal Co.*, 394 U.S. at 381 (applying *Garmon* under RLA even where state regulation was in furtherance of federal scheme, due to need for uniformity). Consideration by this Court is necessary to preserve the objectives of the RLA.

At least two district courts have held that state-law wrongful discharge claims based on union organizing by RLA-covered employees are preempted by the RLA. *See*

Tipton, 741 F. Supp. at 1472;[6] *Calhoun*, 1987 U.S. App. LEXIS 11702 at * 2-3. *Contra*, *Clift v. United Parcel Serv., Inc.*, 133 L.R.R.M. (BNA) 2639 (W.D. Ky. 1990). Moreover, both the Eighth and Tenth Circuits have addressed the preemptive effect of the LMRA over wrongful discharge claims based on union activities. *See Viestenz; Platt.* Both cases applied *Garmon* preemption principles to hold the state-law claims preempted. Preemption of such claims is necessary to avoid the danger of state interference with national labor policy. 681 F.2d at 701-02. "This preemption doctrine is premised on Congress' desire to avoid conflicting rules of substantive law and remedy, thereby ensuring a consistent national labor policy." *Id.* at 702, *citing Garmon*, 359 U.S. at 242.[7]

Both *Viestenz* and *Platt* addressed the applicability of the "local interests" exception to *Garmon* recognized in *Farmer*. Both cases concluded that where the only inquiry under the state claim is wrongful discharge—the same inquiry that would be presented to the federal court under the federal claim—there can be no exception for local interests. As stated in *Farmer*, "concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." 430 U.S. at 305.

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[6] The *Tipton* court does not explicitly refer to Section 2 Fourth as the source of preemption. However, the cases it cites are Section 2 Fourth cases, and the court's analysis implicitly relies on Section 2 Fourth in the context of the overall preemptive force of the RLA.

[7] In *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988), the Ninth Circuit held that the preemptive power of Sections 2 Third and Fourth was not so powerful as to warrant *removal* of a state-law action for wrongful discharge for engaging in union activities under the doctrine of "complete preemption." However, the court explicitly stated that it expressed no opinion on the merits of the preemption defense itself, declaring its confidence in the ability and willingness of state courts to enforce federal defenses. *Id.* at 876.

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. Davies' claim fails this test in every respect. His claim rises or falls on the alleged "discrimination," *i.e.*, his allegation that he was discharged in retaliation for his union activities. His claim is in no way "unrelated" to that alleged discrimination, nor did he or could he allege that his discharge was accomplished in any abusive manner (*cf. Farmer*, where the alleged discrimination was accompanied by threats and intimidation and by allegations of outrageous conduct beyond the bounds of decency and civilized society).

Sections 2 Third and Fourth complement the exclusive representation dispute procedures of Section 2 Ninth. There is no room for state-by-state enforcement of the organizational rights of RLA employees, especially where local enforcement is at odds with a carefully constructed federal scheme that includes arbitration and special complementary federal remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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